

[Cite as *Loy v Liberty Twp. Bd. of Trustees*, 2004-Ohio-1391.]

**IN THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
HANCOCK COUNTY**

**DAVID LOY**

**PLAINTIFF-APPELLANT**

**CASE NO. 5-02-60**

**v.**

**LIBERTY TOWNSHIP BOARD  
OF TRUSTEES**

**OPINION**

**DEFENDANT-APPELLEE**

---

---

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court**

**JUDGMENT: Judgment Affirmed**

**DATE OF JUDGMENT ENTRY: March 22, 2004**

---

---

**ATTORNEYS:**

**DAVID WILLIAM LOY  
In Propria Persona  
9410 County Road 84  
Findlay, Ohio 45840  
Appellant**

**K. C. COLLETTE**  
**Asst. Hancock Co. Prosecutor**  
**Reg. #0014414**  
**P. O. Box 1992**  
**Findlay, Ohio 45840**  
**For Appellee**

**SHAW, P. J.**

{¶1} Plaintiff-Appellant, David Loy, appeals a Hancock County Common Pleas Court judgment that dismissed Loy’s complaint for an injunction and declaratory relief against Defendant-Appellee, Liberty Township Board of Trustees (“Liberty Township”), and granted Liberty Township’s counterclaims, ordering an injunction and abatement of the nuisance on Loy’s property.

{¶2} This case arose in October of 2001, when the Liberty Township zoning inspector sent two zoning violation notices to Loy, regarding violations on his 9410 County Road 84 property in Liberty Township, Hancock County. The violation notices were sent because Loy was using the property for his auto salvage business, Acres of Imported Automobiles. The notices informed Loy that his property was an agricultural zoned district that did not allow for his salvage business. Loy was given until November 9, 2001, to clear the property. Loy did

not comply with the violation notices, nor did he appeal the notices to the Liberty Township zoning board of appeals.

{¶3} In January of 2002, Loy filed a complaint seeking a preliminary injunction to “maintain the status quo of the parties pending the Court’s determination of Plaintiff’s within Declaratory Judgment action,” and a declaratory judgment requesting the court determine whether the use of his property qualified as a prior legal nonconforming use. In February of 2002, Liberty Township filed an answer, claiming as an affirmative defense that Loy failed to exhaust his administrative remedy of appeal to the board of zoning appeals under article XVII, section 1702 of the Liberty Township zoning resolution. Additionally, Liberty Township filed a counterclaim for an injunction and abatement of nuisance, claiming that Loy’s use of the property was in violation of the 1974 zoning resolution.

{¶4} Following a one day trial, the court made numerous findings of fact and ultimately dismissed Loy’s complaint, while granting Liberty Township’s counterclaim. It is from this judgment Loy appeals, presenting nine assignments of error for our review.

**THE TRIAL COURT COMMITTED JUDICIAL ERROR IN DETERMINING THAT AN APPEAL TO THE BOARD OF ZONING APPEALS WAS NECESSARY PRIOR TO APPELLANT'S FILING FOR AN ACTION FOR DECLARATORY RELIEF.**

**THE TRIAL COURT COMMITTED JUDICIAL ERROR IN DETERMINING THAT THE APPELLANT DID NOT ASSERT THE INVALIDITY OF THE ZONING ORDINANCE.**

**THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT'S BUSINESS REQUIRED JUNK DEALER AND/OR MOTOR VEHICLE SALVAGE DEALER LICENSURE.**

**THE TRIAL COURT COMMITTED JUDICIAL ERROR IN DETERMINING THAT THE APPELLANT'S BUSINESS FAILED TO COMPLY WITH REQUIRED LICENSURE BY CONFUSING THE STATE'S DEFINITION OF A JUNK YARD WHICH REQUIRES LICENSURE WITH THE TOWNSHIP'S DEFINITION WHICH DOES NOT NECESSARILY REQUIRE A LICENSE.**

**THE TRIAL COURT ERRED IN APPLYING LAWS IN EFFECT IN 2002, RATHER THAN LAWS IN EFFECT AT THE TIME OF ZONING ENACTMENT, TO DETERMINE THAT THE APPELLANT'S BUSINESS WAS NOT LEGAL AT THE TIME OF THE ZONING ENACTMENT.**

**THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT'S BUSINESS DID NOT MEET LEGAL NONCONFORMING STATUS DESCRIBED IN OHIO REVISED CODE 519.19, WHEN BOTH REQUIREMENTS, (1) EXISTING LAWFUL OPERATION AT THE TIME OF ENACTMENT OF ZONING AND (2) NO VOLUNTARY**

**DISCONTINUANCE FOR TWO YEARS OR MORE, WERE MET.**

**THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT THE APPELLANT'S FENCING COMPLIED WITH AGRICULTURAL REQUIREMENTS AND PROTECTION FROM REGULATION OF TOWNSHIP GOVERNMENT AS MANDATED BY OHIO REVISED CODE SECTION 519.21(B).**

**THE TRIAL COURT COMMITTED JUDICIAL ERROR IN APPLYING JUNK YARD LAW OF SECTION 4737 OF THE OHIO REVISED CODE TO ABATE THE APPELLANT'S VEHICLES AND AN AGRICULTURALLY USED FENCE WHEN THE APPELLANT WAS NOT A JUNK YARD BY STATE DEFINITION.**

**THE TRIAL COURT ERRED IN PERMITTING MR. K. C. COLLETTE TO USE PICTURES AND DOCUMENTS WHICH WERE EXAMPLES OF INTENTIONAL FALSIFICATION OF EVIDENCE AND/OR TAMPERING WITH EVIDENCE EVEN WHEN SUCH BECAME PUBLICLY KNOWN IN COURT.**

{¶5} Due to the nature of appellant's claims, we will address his assignments of error out of order.

*Assignment of Error No. 7*

{¶6} In the seventh assignment of error, Loy asserts that the court erred in failing to find that his perimeter fence was an agricultural fence. Because Loy failed to properly raise this issue below, we cannot consider the issue for the first

time on appeal. Further, upon a review of the entire record, we find there is ample evidence to support a finding that the fence was not an agricultural fence, including Loy's own application to the zoning board to build the perimeter fence for business purposes and Loy's failure to produce any evidence that the fence was built for agricultural purposes. Accordingly, the seventh assignment of error is overruled.

*Assignment of Error No. 9*

{¶7} In the ninth assignment of error, Loy maintains the court erred in admitting certain pictures and documents that he claims were falsified. Generally, an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Childs* (1968), 14 Ohio St.2d 56, 61-62. Having failed at the trial court level to object to the introduction of the challenged pictures and documents or to raise Loy's claim concerning the falsification of this evidence, Loy cannot now raise this issue for the first time on appeal. Accordingly, the ninth assignment of error is overruled.

*Assignments of Error Nos. 1, 2, 3, 4, 5, 6 & 8*

{¶8} Upon a review of the record, we find that the trial court thoroughly addressed all of the relevant factual and legal issues pertaining to the remaining assignments of error in its judgment entry dismissing Loy's complaint and granting Liberty Township's counterclaim. Accordingly, we hereby adopt the final judgment entry of the trial court dated October 7, 2002, incorporated and attached hereto as Exhibit A, as our opinion for these assignments of error. For the reasons stated therein, Loy's remaining assignments of error are overruled.

{¶9} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

CUPP and BRYANT, JJ., concur.

HANCOCK COUNTY, OH  
FILED  
02 OCT -7 PM 2:05  
CATHY PROSSER WILCOX  
CLERK OF COURTS

**FILED**  
COURT OF APPEALS  
DEC 17 2002  
CATHY PROSSER WILCOX  
CLERK  
HANCOCK COUNTY, OHIO

**IN THE COMMON PLEAS COURT OF HANCOCK COUNTY, OHIO**

**DAVID LOY, d/b/a  
Acres of Imported Automobiles,**

**Plaintiff,**

v.

**BOARD OF TRUSTEES  
Liberty Township,**

**Defendant.**

**Case No. 2002-CV-29**

**JUDGMENT ENTRY**

**October 7, 2002**

\_\_\_\_\_ ^

This day this cause comes on for the Court's consideration and decision as to the issues herein taken under advisement by the Court as a result of the court trial which occurred on April 16, 2002. On April 16, 2002, the Court, by judgment entry, required that each party file proposed findings of fact and conclusions of law on or before May 3, 2002. On May 2, 2002, counsel of record for the defendant, Liberty Township Board of Trustees, K.C. Collette, Assistant Prosecuting Attorney for Hancock County, Ohio, filed Defendant's Proposed Findings of Fact and Conclusions of Law. On May 3, 2002, counsel of record for the plaintiff, David Loy d/b/a Acres of Imported Automobiles (hereinafter "Loy"), Samuel B. Morrison, filed Plaintiff's Proposed Findings of Fact and Conclusions of Law by facsimile.

34  
R228-1701



**STATEMENT OF THE CASE**

This case involves a dispute about the use of the plaintiff's property located at 9410 County Road 84, Liberty Township, Hancock County, Ohio (hereinafter "property"). Plaintiff Loy is the operator of Acres of Imported Automobiles, an automobile salvage yard, located on the property. The property has been used for non-agricultural use as a storage area for salvage and used automotive materials. Plaintiff Loy was sent a zoning violation notice from Darrel W. Holdman, the then Zoning Inspector for Liberty Township, by regular mail on October 9, 2001 and by certified mail on October 19, 2001, notifying him that his property was in an agricultural zoned district (A-1) which does not allow for his business. The October 19, 2001 zoning violation notice also provided that Plaintiff Loy had until November 9, 2001 to clear his property of the vehicles used in his business. Plaintiff Loy did not comply with the zoning violation notice.

On January 24, 2002, the plaintiff, through counsel, filed a complaint seeking a preliminary injunction "to maintain the status quo of the parties pending the Court's determination of the merits of Plaintiff's within Declaratory Judgment action," and a declaratory judgment requesting this Court, in pertinent part, to make the following determinations:

1. That the existence of an automobile salvage business at the Property pre-dates the enactment of the Liberty Township Zoning Ordinance.
2. That because the Property has been in continuous use as a yard for salvage and resale of automotive materials since at least 1973, this use pre-dates the Liberty Township Zoning Resolution originally passed in August, 1974.
3. That because the use of the Property as a salvage yard pre-dates the zoning Resolution, it constitutes a non-conforming use of the land permissible under R.C. 519.19.

R 228-1702



4. That Plaintiff, pursuant to the non-conforming use statute R.C. 519.19, has a right to continue to operate his automobile salvage business at 9410 County Road 84, Liberty Township, and Hancock County, Ohio.
5. That any attempt by the Liberty Township Trustees to close Plaintiff's business at the Property based upon violation of the Liberty Township Zoning Resolution is illegal.
6. That under the non-conforming use statute R.C. 519.19, Plaintiff is entitled to continue in his business and is immune from prosecution under the Liberty Township Zoning Ordinance.

On February 8, 2002, the defendant, through counsel, filed an answer, affirmative defense and counterclaim and attached thereto were exhibits including a copy of the October 9, 2001 zoning violation letter from Darrel W. Holdman, Zoning Inspector for Liberty Township; a copy of the October 19, 2001 zoning violation letter from Darrel W. Holdman, Zoning Inspector of Liberty Township; a copy of a certified mail receipt providing that the letter was sent to David Loy on October 19, 2001 and received by Nick Loy on October 20, 2001 at 9410 CR 84, Findlay, Ohio 45840; a copy of Liberty Township Zoning Resolution, Article XVII-Board of Zoning Appeals, Section 1702-Appeal; a copy of a cited legal authority; a copy of Liberty Township Zoning Resolution, Article XII-I-2 General Industrial Districts; and a copy of Liberty Township Zoning Resolution, Article XXI-Enforcement, Penalties and Other Remedies, Section 2101-Public Nuisance Per Se.

As an affirmative defense, the defendant contends that the plaintiff failed to exhaust his administrative remedy of appeal to the Board of Zoning Appeals under Article XVII, Section 1702 of the Liberty Township Zoning Resolution. The defendant further contends that the exhaustion of administrative remedies is a condition precedent to this Court's having jurisdiction of the subject matter of the plaintiff's complaint, and specifically, failure to exhaust those remedies prohibits an action for a declaratory judgment. The defendant requests that the

R 228-1703



plaintiff's complaint be dismissed until the plaintiff has established that he has exhausted his administrative remedies.

In addition, the defendant has counterclaimed for an injunction and abatement of nuisance contending, in pertinent part, that

1. On August 5, 1974, Defendant enacted the Liberty Township Zoning Resolution which contains comprehensive zoning regulations dividing Liberty Township into designated zoning districts and regulating the uses of private property within those zoning districts.
2. Said Zoning Resolution has continually remained in effect to the present.
3. The Liberty Township Zoning Resolution does not permit the storing and/or locating of junk vehicles and/or other similar items and/or the operation of a "Junk Yard" or an automobile salvage business in the Agricultural Zoning District, but does provide for such activities in the I-2 General Industrial District.
4. Plaintiff's property is located within the Agricultural Zoning District of Liberty Township as defined in Article IV of the Liberty Township Zoning Resolution.
5. Plaintiff is presently storing and/or locating junk vehicles and/or other similar items and materials and/or operating a "Junk Yard", as defined in the Liberty Township Zoning Code Article II, Section 201, on the Property and/or is continuing to utilize the Property in this manner.
6. Plaintiff has never applied to Defendant for a Zoning permit to conduct such a business or activity on the Property and/or has never applied to the Board of Zoning appeals for a variance therefrom.
7. Plaintiff purchased said Property on or about February 27, 2001, and since that time has brought and continues to bring several junk and/or abandoned vehicles and/or related materials onto the property and/or operate a "Junk Yard".
8. Said business does not qualify as a pre-existing nonconforming use under the Liberty Township Zoning Resolution, nor has Plaintiff ever applied for a nonconforming status.
9. Plaintiff's utilization of his Property in violation of the Liberty Township Zoning Resolution continues to date and also continues to be extended or enlarged.

R228-1704



10. The Liberty Township Zoning Code, Article XXI, Section 2101 provides that any use of land in violation of the Zoning Resolution is a “. . . public nuisance per se, and may be abated by order of any court of competent jurisdiction.”

The defendant requests an “issuance of an order for a Preliminary Injunction pursuant to Civil Rule 65(B), enjoining Plaintiff from taking any further action which might cause the alleged existing violation to be expanded or enlarged; including, but not limited to, the construction or placement of junk yard type fencing or placement of any additional scrap, junk and/or junk or salvaged vehicles on the Property or any commercial transactions involving the items that are presently on the Property and the subject of this action.” In addition, the defendant requests “the issuance of a decree permanently abating the . . . described nuisance and permanently enjoining Plaintiff from further violating the . . . mentioned zoning restrictions on the property at 9410 County Road 84, Liberty Township, Hancock County, Ohio.” It is upon this status of the record that this matter is before the Court for decision.

The Court, at trial, heard the evidence and testimony presented on behalf of the plaintiff and the defendant.

The Court heard the testimony in the plaintiff’s case in chief of Judge Richard J. Rinebolt, a retired judge of the Hancock County, Ohio Common Pleas Court, and the presiding judge in Bucher, et al., v. Board of Zoning Appeals of Liberty Township, Case No. 89-352-AP, dated October 4, 1990, and Board of Township Trustees, Liberty Township, Hancock County, Ohio v. Bucher, et al., Case No. 90-294-OC, dated May 25, 1994, and the testimony of Timothy Teyner. In addition, the Court heard the testimony of Beverly Teyner; Jerry Rosencrans, resident of 412 Washington Street, Findlay, Ohio; Gary Martin, resident of 1224 Sandusky Street Apartment 12C, Fostoria, Ohio; and Cheryl Neely, resident of 10872 County Road 9 since 1982,

R 228-1705



who all had business dealings with Plaintiff Loy. Finally, in the plaintiff's case in chief, the Court heard the testimony of Darrell Holdman, trustee for Liberty Township since 2002 and Zoning Inspector from 1992-2001, and the plaintiff, David Loy, owner and resident of 9410 County Road 84, Liberty Township, Hancock County, Ohio and operator of Acres of Imported Automobiles, an automobile salvage yard, located on the property.

The defendant, in its case in chief, presented the testimony of Darrell Holdman, trustee for Liberty Township since 2002 and Zoning Inspector from 1992-2001; David Shuck, resident of 9316 County Road 84, Liberty Township, Hancock County, Ohio since 1965; Steve Schoonover, resident of 6480 County Road 84, Liberty Township, Hancock County, Ohio; Jim Switzer, who has been farming the area of County Road 84 for the last forty years; and Greg Powell, resident of 9821 County Road 313, chairman for the Zoning Commission for the last two years, and on the Zoning Board since 1988.

**STIPULATION**

On April 17, 2002, both parties filed a Stipulation to supplement the record with a true and complete copy of the Liberty Township Zoning Resolution adopted on August 5, 1974, and a true and complete copy of the present revised Liberty Township Zoning Resolution adopted in 1993. However, the Court finds, by the document itself, that the present revised Liberty Township Zoning Resolution was adopted on February 22, 1999.

**EXHIBITS**

The following exhibits were admitted into evidence at the trial.

1. A copy of the judgment entry of Judge Richard J. Rinebolt in the case of Bucher, et al., v. Board of Zoning Appeals of Liberty Township, Case No. 89-352-AP, dated October 4, 1990 (Plaintiff's Exhibit 1);

R228-1700



2. A copy of the judgment entry of Judge Richard J. Rinebolt in the case of Board of Township Trustees, Liberty Township, Hancock County, Ohio v. Bucher, et al., Case No. 90-294-OC, dated May 25, 1994 (Plaintiff's Exhibit 2);
3. A photograph of vehicles purchased from Plaintiff Loy on the property of Cheryl Neely at 10872 County Road 9 (Plaintiff's Exhibit 3);
4. A copy of the Application for Zoning Permit for perimeter fencing to fence the plaintiff's business signed by Plaintiff Loy and dated December 14, 2001 along with a copy of a Twenty Dollar (\$20.00) check written to Liberty Township Trustees by Plaintiff Loy and dated December 14, 2001 (Plaintiff's Exhibit 5);
5. A list showing fifty-six (56) active vehicle titles, in Hancock County, Ohio, in Plaintiff Loy's name and dated April 1, 2002 (Plaintiff's Exhibit 6);
6. A copy of the Certificate of Result of Election on Question or Issue where the Board of Elections of Hancock County certified that at the election held in Liberty Township, Hancock County, Ohio on November 2, 1993, 820 voted "yes" and 460 voted "no" in answer to the question "Shall the proposed zoning resolution as adopted on August 14, 1993 by the Board of Township Trustees of Liberty Township, Hancock County, Ohio, be approved?" (Plaintiff's Exhibit 7);
7. A photograph of a landfill at 10882 County Road 9 (Plaintiff's Exhibit 8);
8. A photograph of a junk yard at the residence of David Shuck, 9316 County Road 84, Liberty Township, Hancock County, Ohio (Plaintiff's Exhibit 9);
9. A handwritten letter dated October 5, 1998 (Plaintiff's Exhibit 10);
10. An aerial photograph of Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio (Defendant's Exhibit A);
11. An aerial photograph of Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio (Defendant's Exhibit B);
12. A Hancock County Auditors' aerial photograph of Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio in 2000 (Defendant's Exhibit C);
13. A Hancock County Auditors' aerial photograph of Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio in 2000 (Defendant's Exhibit D);

R228-1707



14. A photograph of a fence on Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio (Defendant's Exhibit E);
15. Several photographs of Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio in February of 2002 (Defendant's Exhibit F);
16. An aerial photograph of Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio in 1998 (Defendant's Exhibit G);
17. A copy of the 1974 Zoning Districts Map in Liberty Township including A-1 Agricultural Zone and I-2 General Industrial Zone and the 2001 Zoning Districts Map in Liberty Township including A-1 Agricultural Zone and I-2 General Industrial Zone (Defendant's Exhibit H);
18. A photograph of vehicles on Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio (Defendant's Exhibit I);
19. A photograph of vehicles on Plaintiff Loy's property at 9410 County Road 84, Liberty Township, Hancock County, Ohio (Defendant's Exhibit J);
20. A copy of the October 9, 2001 zoning violation letter from Darrel W. Holdman, Zoning Inspector for Liberty Township; a copy of the October 19, 2001 zoning violation letter from Darrel W. Holdman, Zoning Inspector for Liberty Township; a certified mail receipt providing that the letter was sent to David Loy and received by Nick Loy on October 20, 2001 at 9410 CR 84, Findlay, Ohio 45840 (Defendant's Exhibit K).

**FINDINGS OF FACT**

1. Plaintiff Loy is the owner and resident of the property located at 9410 County Road 84, Liberty Township, Hancock County, Ohio.
2. Plaintiff Loy is the operator of Acres of Imported Automobiles, an automobile salvage yard, located on the property.
3. Plaintiff Loy was sent a zoning violation notice from Darrel W. Holdman, Zoning Inspector of Liberty Township, by regular mail on October 9, 2001 and by certified mail on October 19, 2001, notifying him that his property was in an agricultural zoned district (A-1) which does not allow for his business (Defendant's Exhibit K).

R228-1708



4. Plaintiff Loy was notified in the October 19, 2001 zoning violation notice that he had until November 9, 2001 to clear his property of the vehicles used in his business (Defendant's Exhibit K).
5. Plaintiff Loy did not comply with the zoning violation notice.
6. The Liberty Township Zoning Resolution, enacted in 1974 and amended in 1999, provided in Article XVII, Section 1702 as amended that "[a]n appeal may be taken to the Board of Zoning Appeals by any person, firm, or corporation . . . affected by a decision of the Zoning Inspector."
7. Plaintiff Loy did not appeal to the Board of Zoning Appeals and instead, filed a complaint for declaratory judgment on January 24, 2002.
8. Plaintiff Loy asserts in his complaint for declaratory judgment that "the use of his property as a salvage yard pre-dates the adoption of the Liberty Township Zoning Resolution on August 5, 1974," and that "his business meets the requirements for a non-conforming use, pursuant to R.C. 519.19, and therefore, is not in violation of the Liberty Township Zoning Resolution."
9. The defendant, through counsel, filed an answer, affirmative defense and counterclaim on February 8, 2002 asserting the affirmative defense of failure to exhaust administrative remedies.
10. The Court finds that the plaintiff failed to exhaust his administrative remedies pursuant to the Liberty Township Zoning Resolution and has not by his pleadings challenged the validity or constitutionality of the zoning ordinance.
11. The Liberty Township Zoning Resolution, as amended in 1999, Article IV, A-1 Agricultural Districts, does not permit the storing and/or locating of junk vehicles and/or other similar

2288-1709



items and/or the operation of a junk yard or an automobile salvage business in the Agricultural Zoning District (Stipulation to Supplement the Record).

12. Plaintiff Loy's property, at 9410 County Road 84, Liberty Township, Hancock County, Ohio, is located within the A-1 Agricultural Zoning District of Liberty Township, Hancock County, Ohio (Defendant's Exhibit H).
13. Plaintiff Loy is the operator of Acres of Imported Automobiles, an automobile salvage yard, located on the property, at 9410 County Road 84, Liberty Township, Hancock County, Ohio, and the property has been used for non-agricultural use as a storage area for salvage and used automotive materials.
14. Plaintiff Loy's use of his property constituted a zoning violation absent his establishment of a nonconforming use.
15. Ohio Revised Code Section 519.19 provides, in pertinent part, that  

[t]he lawful use of any . . . land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25, inclusive, of the Revised Code.
16. Section 4737.07 of the Ohio Revised Code requires a license prior to any person operating and maintaining a junk yard outside of a municipality.
17. Section 4738.02 of the Ohio Revised Code requires a license prior to any person engaging in the business of selling at retail salvage motor vehicles.
18. Plaintiff Loy, at no time, obtained the required license under Section 4737.07 of the Ohio Revised Code or Section 4738.02 of the Ohio Revised Code.

R228-1710



19. The Court finds that at no time did Plaintiff Loy legally operate his business because at no time did he have the statutorily required license under Section 4737.07 of the Ohio Revised Code or Section 4738.02 of the Ohio Revised Code.

20. Ohio Revised Code Section 519.24 provides, in pertinent part, that

[i]n case . . . any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, such board, [or] the prosecuting attorney of the county . . . in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use.

21. In addition, the Liberty Township Zoning Code, as amended in 1999, Article XXI, Section 2101 provided that any use of land in violation of the Zoning Resolution is a "public nuisance per se, and may be abated by order of any court of competent jurisdiction."

22. Ohio Revised Code Section 4737.11 also provides, in pertinent part, that

[w]henver the prosecuting attorney of any county . . . is of the opinion that a junk yard is being operated or maintained in violation of any of the provisions of sections 4737.05 to 4737.12, inclusive, or the Revised Code, he may apply . . . to a court of competent jurisdiction, alleging the violation complained of and praying for an injunction or other proper relief. In such a case the court may order such junk yard abated as a nuisance or make such other order as may be proper.

23. This Court finds that it is authorized to order the abatement of the nuisance on the plaintiff's property and the permanent enjoinder of the plaintiff from further violating the Liberty Township Zoning Regulations governing the property at 9410 County Road 84, Liberty Township, Hancock County, Ohio.

R228-1711



**CONCLUSIONS OF LAW**

The first issue before the Court is whether the plaintiff's failure to exhaust administrative remedies before filing this action affects the availability of declaratory relief. The Supreme Court of Ohio has held that "the doctrine of failure to exhaust administrative remedies is not a jurisdictional defect to a declaratory judgment action; it is an affirmative defense that may be waived if not timely asserted and maintained." Jones v. Chagrin Falls (1997), 77 Ohio St.3d 456, 462 (citations omitted). The Ohio Supreme Court went on to state that

'[i]t is the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' Our decision today simply clarifies that under our adversarial system of justice it is the responsibility of the party seeking to benefit from the doctrine to raise and argue it. Once raised, it becomes the duty of the trial court to determine upon consideration of the affirmative defenses and the elements of a declaratory judgment action, whether such action is proper.

Id. (citation omitted).

Because the defendant in the case sub judice raised the affirmative defense of failure to exhaust administrative remedies, it is this Court's duty "to determine upon consideration of the affirmative defense[] and the elements of a declaratory judgment action, whether such action is proper." Id.

The Ohio Supreme Court has held that "declaratory relief was unavailable absent exhaustion of adequate administrative remedies whenever the invalidity or unconstitutionality of the zoning ordinance is not asserted by plaintiff." Fairview Gen. Hosp. v. Fletcher (1992), 63 Ohio St.3d 146, 150 (citation omitted); see Jones, supra; see also Milliron Waste Mgmt., Inc. v. Village of Crestline (1999), 135 Ohio App.3d 15, 18 (citation omitted).

R 228-1712



In the case sub judice, the plaintiff has not challenged the validity or constitutionality of the zoning ordinance. Instead, the plaintiff asserted in his complaint that "the use of his property as a salvage yard pre-dates the adoption of the Liberty Township Zoning Resolution on August 5, 1974," and that "his business meets the requirements for a non-conforming use, pursuant to R.C. 519.19, and therefore, is not in violation of the Liberty Township Zoning Resolution."

In addition, Plaintiff Loy was sent a zoning violation notice from Darrel W. Holdman, Zoning Inspector of Liberty Township, by regular mail on October 9, 2001 and by certified mail on October 19, 2001, notifying him that his property was in an agricultural zoned district (A-1) which does not allow for his business. Plaintiff Loy was also notified in the October 19, 2001 zoning violation notice that he had until November 9, 2001 to clear his property of the vehicles used in his business. Plaintiff Loy did not comply with the zoning violation notice. The Liberty Township Zoning Resolution, as amended in 1999, Article XVII, Section 1702 provided that "[a]n appeal may be taken to the Board of Zoning Appeals by any person, firm, or corporation . . . affected by a decision of the Zoning Inspector." The plaintiff failed to exhaust his administrative remedy of appeal to the Board of Zoning Appeals.

Inasmuch as the plaintiff has not asserted the invalidity or unconstitutionality of the zoning ordinance, his failure to exhaust available administrative remedies before filing his complaint for a declaratory judgment precludes him from seeking declaratory relief. See Jones, supra; see also Gordon v. Green (1996), 113 Ohio App.3d 729, 733.

It is accordingly **ORDERED, ADJUDGED AND DECREED** that the plaintiff's complaint for injunction and declaratory relief against the defendant be and hereby is dismissed.

2008-1713



The Court will now address the defendant's motion for default judgment on its counterclaim filed on March 14, 2002, and the plaintiff's motion for leave to file answer to counterclaim instante filed on March 22, 2002. Those matters were taken under advisement by the Court at the time of trial.

When a motion for leave to answer is filed after the date the answer was due, Civil Rule 6(B)(2) permits an extension upon a showing of excusable neglect. State ex rel. Weiss v. Industrial Com. Of Ohio (1992), 65 Ohio St.3d 470, 472. Rule 6(B)(2) of the Ohio Civil Rules of Procedure provides, in pertinent part, that

[w]hen by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Civ. R. 6(B)(2).

In determining whether neglect is excusable or inexcusable, all the surrounding facts and circumstances must be taken into consideration. Davis v. Immediate Medical Servs. (1997), 80 Ohio St.3d 10, 14. Neglect under Civil Rule 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances. Id. "[C]ourts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds." Fowler v. Coleman, No. 99AP-319, 1999 Ohio App. LEXIS 6480, at \*8-9 (citing Marion Production Credit Assn. v. Cochran (1988), 40 Ohio St. 3d 265, 271). "Accordingly, where a defendant, after failing to file a timely answer, files a . . . motion setting forth grounds of excusable neglect pursuant to Civ.R. 6(B), the court may permit the defendant to file a timely answer, thereby permitting the case to proceed on its merits." Id. at \*9 (citations omitted).

R 228-1714



The plaintiff's answer to the counterclaim in the case sub judice was due to be filed on or about March 8, 2002 pursuant to Civil Rule 12(A)(2). On March 14, 2002, the defendant, through counsel, filed a motion for default judgment on its counterclaim since more than twenty-eight days had passed since February 8, 2002, and the plaintiff had failed to serve the defendant with a reply to the counterclaim or otherwise defend.

On March 22, 2002, the plaintiff, through counsel, filed a motion for leave to file answer to counterclaim instanter with supporting memorandum. The plaintiff's counsel asserted that he was out of the country from March 7, 2002 to March 14, 2002 and that "[d]espite preparing the answer, signing, and instructing his staff to mail the same to this honorable Court and opposing counsel forthwith, the same was not accomplished." The plaintiff's counsel attached a copy of his passport with his departure date of March 7, 2002. The plaintiff asserted that "[p]rior to counsel's departure he took every step possible to assure that the filing of the answer would take place as he instructed his staff," but "unfortunately, the same was not accomplished in a timely manner." The plaintiff also asserted that he "intended to defend the claims of the Defendants as he was the one to initiate this action." Finally, the plaintiff asserted that "should this honorable Court grant Plaintiff's request and permit the filing of the answer, Defendants would not be prejudiced nor would this matter be unduly delayed."

When all facts and circumstances are taken into consideration, this Court finds that the defendant, after failing to file a timely answer, has set forth grounds of excusable neglect pursuant to Civ.R. 6(B). It is accordingly **ORDERED, ADJUDGED AND DECREED** that the defendant's motion for default judgment on counterclaim, as filed on March 14, 2002, is denied and the plaintiff's motion for leave to file answer to counterclaim instanter, as filed on March 22, 2002, is granted. Therefore, the plaintiff's Answer to Defendants' Counterclaim is ordered filed

R 228-1715



as of March 22, 2002 and is permitted for consideration, thereby permitting the case to proceed to adjudication on its merits.

As to the remaining counterclaim brought by the defendant against the plaintiff for an injunction and abatement of nuisance, the Third District Court of Appeals has provided that

[i]n an action for a zoning violation, townships have the initial burden of proving a zoning violation . . . [The] fact that the . . . use of [the] property violated the zoning ordinance absent [the] establishment of a nonconforming use was not disputed. Thereafter, the landowner claiming the defense of a valid nonconforming use must then prove that such nonconforming use lawfully existed prior to the enactment of the applicable zoning resolution.

State v. Volbert, 2002-Ohio-2763, at ¶14 (citations omitted); see also State v. Crawford, 2002-Ohio-2709, at ¶26 (citations omitted).

In the case sub judice, the defendant had the initial burden of proving a zoning violation. See id. However, the fact is not disputed that the plaintiff's use of his property constituted a zoning violation absent his establishment of a nonconforming use. As such, the plaintiff, who is claiming the defense of a valid nonconforming use under Ohio Revised Code Section 519.19, must prove that such nonconforming use lawfully existed prior to the enactment of the applicable zoning resolution. See id.

Ohio Revised Code Section 519.19 provides, in pertinent part, that

[t]he lawful use of any . . . land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25, inclusive, of the Revised Code.

O.R.C. §519.19.

2228-1710



The Ninth District Court of Appeals provided that “[t]o prevail on a claim for nonconforming use, the landowner must prove by a preponderance of the evidence that the use existed on the effective date of the zoning change and that the use was legal at that time.” Board of Trustees v. Albertson, C.A. No. 01CA007785, 2001-Ohio-1510, at \*6-7 (citation omitted). In addition, the Ninth District Court of Appeals provided that

[i]t is well settled in Ohio that in order to qualify as a prior, nonconforming use under R.C. 519.19, the use of the property must have been lawful at the time that use was established. Pschesang v. Terrace Park (1983), 5 Ohio St. 3d 47, 448 N.E.2d 1164, syllabus. In order for appellants to be exempted from the township’s resolution, then, the operation of their junk yard/scrapping metal salvage business must have been lawful.

. . . R.C. 4737.06 provides that ‘no person shall operate or maintain a junk yard \* \* \* unless he has first obtained a license \* \* \*.’ In the instant case, appellants do not dispute that at no time did they ever obtain the required license. The lower court determined that because appellants had failed, at any time, to comply with the licensing requirement, their business was never lawfully operated and could not be excepted from the zoning resolution as a prior nonconforming use.

....

R.C. 4737.11 clearly authorizes a court to issue an injunction or ‘such other order as may be proper’ where an individual has violated R.C. 4737.06 by failing to obtain or maintain a license. Given that appellants were never in compliance with R.C. 4737.06, their business was never lawfully operated. Their use, then, was not only properly enjoined, it was properly denied nonconforming use status.

Castella v. Stepak, C.A. No. 96CA0057, 1997 Ohio App. LEXIS 2023, at \*3-4, 6-7.

In order for the plaintiff in the case sub judice to be exempted from the township’s resolution, the operation of his junk yard must have been lawful. See id. Ohio Revised Code Section 4737.07 provides, in pertinent part, that

[n]o person shall operate and maintain a junk yard outside of a municipality, except in zoned or unzoned industrial areas adjacent to the interstate or primary systems, without first obtaining a license to do so from the county auditor of the

2008-1717



county in which such junk yard is located or in which such junk yard is to be established.

O.R.C. §4737.07.

Thus, Section 4737.07 of the Ohio Revised Code requires a license prior to any person operating and maintaining a junk yard outside of a municipality. Id. In addition, section 4738.02 of the Ohio Revised Code requires a license prior to any person engaging in the business of selling at retail salvage motor vehicles. O.R.C. §4738.02(A). In the case sub judice, the plaintiff does not dispute that at no time did he ever obtain the required license. Thus, at no time did the plaintiff legally operate his business because at no time did he have the statutorily required license under Section 4737.07 of the Ohio Revised Code or Section 4738.02 of the Ohio Revised Code. Again, a prior land use must be lawful or it 'cannot constitute a nonconforming use.' Castella, supra at \*5 (citing Pschesang, supra at 49). Thus, because the plaintiff failed, at any time, to comply with the licensing requirement, his business was never lawfully operated and could not be excepted from the zoning resolution as a prior nonconforming use. See id.

Again, the fact is not disputed that the plaintiff's use of his property constituted a zoning violation absent his establishment of a nonconforming use under Ohio Revised Code Section 519.19. The Liberty Township Zoning Resolution, as amended in 1999, Article IV, A-1 Agricultural Districts, does not permit the storing and/or locating of junk vehicles and/or other similar items and/or the operation of a junk yard or an automobile salvage business in the Agricultural Zoning District. The plaintiff's property, at 9410 County Road 84, Liberty Township, Hancock County, Ohio, is located within the A-1 Agricultural Zoning District of Liberty Township, Hancock County, Ohio. It is not disputed that the plaintiff is the operator of Acres of Imported Automobiles, an automobile salvage yard, located on the property, at 9410

R228-178



County Road 84, Liberty Township, Hancock County, Ohio, and that the property has been used for non-agricultural use as a storage area for salvage and used automotive materials. Thus, the plaintiff's use of his property constituted a zoning violation absent his establishment of a nonconforming use under Ohio Revised Code Section 519.19. The Court finds that the plaintiff has failed to establish a nonconforming use.

Ohio Revised Code Section 519.24 provides, in pertinent part, that

[i]n case . . . any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, such board, [or] the prosecuting attorney of the county . . . in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use.

O.R.C. §519.24.

In addition, the Liberty Township Zoning Code, as amended 1999, Article XXI, Section 2101 provides that any use of land in violation of the Zoning Resolution is a "public nuisance per se, and may be abated by order of any court of competent jurisdiction." Ohio Revised Code Section 4737.11 also provides, in pertinent part, that

[w]henver the prosecuting attorney of any county . . . is of the opinion that a junk yard is being operated or maintained in violation of any of the provisions of sections 4737.05 to 4737.12, inclusive, or the Revised Code, he may apply . . . to a court of competent jurisdiction, alleging the violation complained of and praying for an injunction or other proper relief. In such a case the court may order such junk yard abated as a nuisance or make such other order as may be proper.

O.R.C. §4737.11.

As such, this Court is clearly authorized to order the abatement of the nuisance on the plaintiff's property and the permanent enjoinder of the plaintiff from further violating the Liberty Township Zoning Regulations governing the property at 9410 County Road 84, Liberty

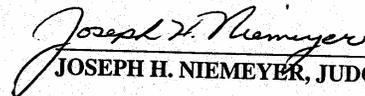
R 228-1719



Township, Hancock County, Ohio. It is accordingly **ORDERED, ADJUDGED AND DECREED** that the defendant is entitled to judgment against the plaintiff on the allegations of its counterclaim and that the plaintiff shall have all salvage and/or junk and/or second-hand vehicles and materials, and any other items associated with the operation of a junk yard, salvage business, or second-hand car sales, including the recently constructed metal fence located in proximity to the south property line, completely removed and cleared from the property at 9410 County Road 84, Liberty Township, Hancock County, Ohio, on or before November 8, 2002. In addition, this cause is assigned for an additional hearing on November 20, 2002 at 8:30 A.M. as to compliance with the order outlined above.

The costs of this action are assessed against Plaintiff Loy.

All until further order of the Court.

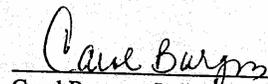
  
JOSEPH H. NIEMEYER, JUDGE

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the 7<sup>th</sup> day of October, 2002, a time-stamped copy of the foregoing was delivered to the following by ordinary U.S. Mail.

K.C. Collette  
222 Broadway  
Findlay, Ohio 45840

Samuel B. Morrison, Esq.  
3425 Executive Parkway  
Suite 206  
Toledo, OH 43606

  
Carol Burgess, Judicial Assistant

